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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960 1963

No. ~~[illegible]~~ 3

DALE H. DREWS, ET AL.,

Appellants,

v.

STATE OF MARYLAND,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

JURISDICTIONAL STATEMENT

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IN THE

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No. ------

DALE H. DREWS, ET AL.,

Appellants,

v.

STATE OF MARYLAND,

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ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

JURISDICTIONAL STATEMENT

Appellants appeal from the decision of the Court of Appeals of Maryland entered on January 18, 1961, affirming the judgments of the Circuit Court for Baltimore County, Maryland, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial federal question is presented.

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland is reported in Md. , A. 2d . A

copy of the opinion (which contains the judgment) is attached hereto as Appendix A. The memorandum opinion of the Circuit Court for Baltimore County, Maryland, is unreported and is attached hereto as Appendix B.

JURISDICTION

1. This prosecution was begun by the filing of a criminal information by the State's Attorney for Baltimore County, Maryland, against the appellants under Section 123 of Article 27 of the Annotated Code of Maryland (1957 edition). Appellants were convicted of the charge on May 6, 1960. The decision of the Court of Appeals of Maryland affirming the convictions was filed on January 18, 1961. Notice of appeal was filed in that Court on February 13, 1961.

2. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257(2). Appellants challenge the constitutionality of Section 123 of Article 27 of the Annotated Code of Maryland (1957 edition) as interpreted by the Court of Appeals of Maryland in its decision of January 18, 1961, on the ground that, as so interpreted, it is repugnant to the Constitution of the United States of America, and the decision of the highest court of the State was in favor of its validity as so interpreted. The following cases sustain the jurisdiction of the Supreme Court of the United States to review the decision of the Court of Appeals of Maryland on direct appeal. *Frank v. Maryland*, 359 U.S. 360, 79 S. Ct. 804, 3 L. Ed. 2d 877 (1959); *Niemotko v. Maryland*, 340 U.S. 268, 71 S. Ct. 325, 95 L. Ed. 267 (1951); *McCollum v. Board of Education*, 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649 (1948).

3. Constitutional provisions and statutes involved: The relevant part of Section 123 of Article 27 of the Annotated Code of Maryland (1957 edition) is as follows:

> "Every person who shall be found drunk, or acting in a disorderly manner to the disturbance of the public peace, upon any public street or highway, in any city, town or county in this State, or at any place of public worship or public resort or amusement in any city, town or county of this State, or in any store during business hours, or in any elevator, lobby or corridor of any office building or apartment house having more than three separate dwelling units in any city, town or county of this State, shall be deemed guilty of a misdemeanor; and, upon conviction thereof, shall be subject to a fine of not more than fifty dollars, or be confined in jail for a period of not more than sixty days or be both fined and imprisoned in the discretion of the court; . . ."

Amendment I of the United States Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble, and petition the Government for a redress of grievances."

Amendment XIV of the United States Constitution:

Section 1

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

Appellants, two white males, 1 white female and one Negro female, were convicted of violating a statute making it a criminal offense to act in a disorderly manner to the disturbance of the public peace in a place of public resort or amusement. The basis for the convictions was the refusal of the appellants to leave a public amusement park, owned by a private corporation. The Negro appellant and another Negro were asked to leave the park because the owner had a policy of not admitting Negroes. The white persons were requested to leave because they were in the same group as the two Negroes. The appellants at all times acted in a courteous and peaceful manner, and their only conduct which was found to be disorderly was their refusal to leave the amusement park when requested. Under these circumstances were the appellants:

1. Denied their rights under the privileges and immunities, equal protection and due process clauses of the Fourteenth Amendment of the Constitution of the United States in that they were arrested and convicted, upon the request of a private owner, under a statute which was interpreted by the highest court of the State to make a criminal offense the refusal to leave a place of public resort and amusement when the request to leave was based solely on the ground that the presence of the appellants conflicted with the owner's policy that members of the Negro race should be excluded;

2. Denied their rights under the due process clause of the Fourteenth Amendment in that they were arrested and convicted for exercising their rights to freedom of expression and association;

3. Denied their rights under the equal protection and due process clauses of the Fourteenth Amendment in that they were arrested and convicted without any evidence that the appellants acted in a disorderly manner to the disturbance of the public peace;

4. Denied their rights under the equal protection clause of the Fourteenth Amendment in that they were arrested and convicted of acting in a disorderly manner to the disturbance of the public peace although the evidence clearly showed that others were the only persons acting in a disorderly manner and such other persons were not proceeded against by the State.

STATEMENT OF THE CASE

On Sunday, September 6, 1959, the appellants, three whites and one Negro, together with another Negro, went to Gwynn Oak Park, a public amusement park in Baltimore County, Maryland owned by a private corporation. All Nations Day was being celebrated at the park on that particular day (R. 33-34, E. 15).[1] About 3:00 P.M. the five individuals were standing approximately in the center of the park. They were in a group by themselves and had attracted no attention from others present on the park premises (R. 34, 36, E. 15, 17). A private park guard approached them and told them that the park was closed to colored persons and that they would have to leave (R. 19, 35, E. 7, 16). There was no evidence that appellants had prior knowledge of such an exclusionary policy (See p. 31 of Appendix B). The initial direction to leave was given to the two Negroes. When they remained, all five persons were asked to leave, but they refused (R. 22, E.

[1] "R." references are to the transcript of testimony at the trial; "E." references are to the Record Extract printed as part of appellants' brief in the Court of Appeals.

9). Appellants were very polite to the guard; one stated that he was enjoying himself and was going to stay and look around a little bit more (R. 22-23, E. 8, 9). Although the park was crowded (R. 48, E. 23), there was no particular congregation around the appellants until they were approached and asked to leave by the park guard (R. 33-36, E. 15-17).

Upon the refusal of the appellants to leave the park, the guard summoned the Baltimore County police (R. 23, E. 8). After requesting the appellants to leave (R. 35, 40-42, E. 16, 19, 20), the police arrested the appellants on the specific request of a park official (R. 43, 49-50, E. 20, 24). The park official ordered the arrest in furtherance of the amusement park's policy of excluding Negroes (R. 19-22, 49-51, E. 7, 8, 24). During the period between the time the appellants were first requested to leave by the park police and their arrest by the County police, a crowd gathered around the appellants and the police, and its members appeared to become angry and engaged in certain unruly and disorderly activities, including spitting at and kicking the appellants and using improper language in speaking to them (R. 23-24, 26, 28, E. 9, 11, 12). There was no attempt by the park officials or by the County police to exclude from the park or to arrest any of those who engaged in the disorderly conduct (R. 37, 51, 67, E. 17, 24, 33).

When arrested, appellants locked arms (R. 43, E. 20). Appellants Drews and Sheehan, in a further show of passive resistance, proceeded to lie on the ground at which time the joining of arms with the other two appellants ceased (R. 38, 45, 51, 54, E. 17, 21, 22, 26). Appellants Joyner and Brown left the park in the custody of the police but under their own power (R. 46, 53, E. 22, 26). The others were carried out (R. 38, E. 18). None of the

appellants offered positive resistance and they made n
remarks other than a plea by Drews for forgiveness
someone who was mistreating him (R. 26, 29, 47, 61, 6
E. 11, 13, 22, 30, 31). The appellants were then taken
a police station where an employee of the park swore ou
a warrant against them.

On April 5, 1960, the appellants were charged in a
amended criminal information with "acting in a disorderl
manner, to the disturbance of the public peace, at, in
on Gwynn Oak Amusement Park, Inc., a body corporat
a place of public resort and amusement in Baltimor
County" contrary to Section 123 of Article 27 of the An
notated Code of Maryland (1957 edition). On April
1960, appellants were arraigned, pleaded not guilty an
waived a jury trial. The trial then took place on th
same day. At the trial, the officer who arrested the ap
pellants testified that, had it not been for the request
the park official that appellants be arrested, he woul
not have arrested them (R. 52, E. 25). At the conclu
sion of the State's case, appellants moved for a directe
verdict, which motion was taken under advisement b
the Court. On May 6, 1960, the Court denied appellant
motion for a directed verdict. Appellants introduced n
testimony and renewed their motion for a directed ve
dict. The Court thereupon entered a verdict of guilt
against each of the appellants and imposed a sentence
$25.00 plus costs on each. The opinion of the Court
attached hereto as Appendix B. On June 2, 1960, an ap
peal to the Court of Appeals of Maryland was filed. O
January 18, 1961, the Court of Appeals of Maryland a
firmed the judgments rendered against the appellant
The opinion of the Court is attached hereto as Appendi
A. Notice of appeal was filed with the Court of Appea
on February 13, 1961.

HOW THE FEDERAL QUESTIONS ARE PRESENTED

The Federal questions to be reviewed in this Court were raised in the Court of the first instance (the Circuit Court for Baltimore County, Maryland) generally by pleas of not guilty entered on April 8, 1960. On this same day at the end of the presentation of the State's evidence, the appellants requested a directed verdict of not guilty on the grounds, inter alia, that, if appellants were convicted, they would be denied their constitutional rights under the Fourteenth Amendment. These contentions were originally made in oral argument. Since there is no transcript of the oral arguments, a reference to the record cannot be made. Although in the memorandum filed by the appellants in support of the motion for a directed verdict of not guilty, each of the four constitutional arguments presented to this Court were presented and argued, the Circuit Court judge, in his memorandum opinion, did not pass on any of these constitutional arguments. The same contentions were presented to the Court of Appeals of Maryland in the brief of the appellants. That Court ruled on Point 1 on pages 27-29 of Appendix A, Point No. 3 on pages 25-27, Point No. 2 and Point No. 4 were not specifically ruled upon by the Court of Appeals but were rejected by the affirmance of the judgments of the Circuit Court.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

1. The arrest and conviction of the appellants are the use of State action to enforce private discrimination, and, therefore, constitute violations of the rights of the appellants under the Fourteenth Amendment.

The State of Maryland, by the decision in this case, has made the act of refusing to leave an amusement park open to the public but owned by a private corporation, when the request to leave arises solely from the policy

of the park owner to exclude Negroes, a criminal offense. This case raises the important constitutional question of whether a state can, without violating the Fourteenth Amendment, support, by the use of its criminal laws, policies of racial discrimination adopted by owners of places of public resort or amusement. It has long been the law that a state cannot, under the Fourteenth Amendment, adopt and enforce a policy of racial segregation directly through the use of its criminal laws. *Buchanan v. Warley*, 245 U.S. 60, 38 S. Ct. 16, 62 L. Ed. 149 (1917); *Holmes v. City of Atlanta*, 350 U.S. 879, 76 S. Ct. 141, 100 L. Ed. 776 (1955); *Gayle v. Browder*, 352 U.S. 903, 77 S. Ct. 145, 1 L. Ed. 2d 114 (1956); *State Athletic Commission v. Dorsey*, 359 U.S. 533, 79 S. Ct. 1137, 3 L. Ed. 2d 1028 (1959). Likewise a state cannot maintain racial segregation in publicly owned facilities. *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 2d 873 (1954); *Mayor and City Council of Baltimore v. Dawson*, 350 U.S. 877, 76 S. Ct. 133, 100 L. Ed. 774 (1955).

The thrust of the Fourteenth Amendment has not, however, been limited solely to those laws or state actions which enforce racial segregation policies directly adopted or supported by the state. In *Shelley v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 (1948), and in *Barrows v. Jackson*, 346 U.S. 249, 73 S. Ct. 1031, 97 L. Ed. 1586 (1953), this Court held that the Fourteenth Amendment prohibited judicial enforcement of racial covenants in private deeds. Those decisions established that it was improper state action for a state court to enjoin, or award damages for, the violation of such covenants. This Court determined that such judicial enforcement was state action and, therefore, fell within the prohibition set forth in the Fourteenth Amendment, even though the discriminatory policy had its source in a private agreement. In spite of

these holdings by this Court, the Court of Appeals of Maryland, in its opinion in this case, quoted with approval from *Griffin v. Collins*, 187 F. Supp. 149, 153 (D. Md. 1960), as to the right of the operator of a place of business serving the public to call upon the State to aid it in the enforcement of its private policy of racial discrimination:

> "Plaintiffs have cited no authority holding that in the ordinary case, where the proprietor of a store, restaurant, or amusement park, himself or through his own employees, notifies the Negro of the policy and orders him to leave the premises, the calling in of a peace officer to enforce the proprietor's admitted right would amount to deprivation by the state of any rights, privileges or immunities secured to the Negro by the Constitution or laws. Granted the right of the proprietor to choose his customers and to eject trespassers, it can hardly be the law, as plaintiffs contend, that the proprietor may use such force as he and his employees possess but may not call on a peace officer to enforce his rights."

The Maryland Court of Appeals went on to say:

> "In the absence of controlling authority to the contrary, it is our opinion that the arresting and convicting of appellants on warrants sworn out by the Park for disorderly conduct, which resulted from the Park enforcing its private, lawful policy of segregation, did not constitute 'such action as may fairly be said to be that of the States.' It was at least one step removed from State enforcement of a policy of segregation and violated no constitutional right of appellants."

Appellants contend that, as to the central question of whether state enforcement of a private segregation policy is state action within the meaning of the Fourteenth Amendment, the decision in this case is contrary to the holding of this Court in *Shelley v. Kraemer*, *supra*, and

Barrows v. Jackson, supra. In *Shelley v. Kraemer, supra* (334 U.S. at 22), this Court clearly stated:

> "The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals. And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment."

In *Barrows v. Jackson, supra*, this Court held that the awarding of damages for the violation of a racially restrictive covenant, an even more indirect enforcement of racial discrimination than arrest and conviction, would sanction the use of such covenants; and that, therefore, such state action came under the prohibition of the Fourteenth Amendment in the same manner as the action to enjoin the violation of such covenants in *Shelley v. Kraemer, supra*. Certainly, the use of the criminal laws of a state to enforce a private policy of racial discrimination is no less a direct enforcement and sanction of such a policy than an injunction against, or an award of damages for, the violation of a racially restrictive covenant in a deed. In so far as the appellants are concerned, the use of state action was as direct as any action could be in that the appellants were either forcefully carried or led from the amusement park by members of the County Police force. To say that such enforcement is "at least one step removed from state enforcement of a policy of segregation" is to confuse enforcement of the segregation policy with the making of such policy. *Shelley v. Kraemer, supra*, and *Barrows v. Jackson, supra*, are clear in holding that the source of the segregation policy is immaterial where it is the enforcement of such policy by state action which makes the policy effective.

The above principle has been recognized by the Courts of Appeals for both the Third and Fifth Circuits. *Valle v. Stengel*, 176 F. 2d 697 (3rd Cir., 1949), involved a suit for damages by a group of Negroes and white persons against the Chief of Police of Fort Lee, New Jersey, for depriving them of their rights under Article 4 and the Fourteenth Amendment of the United States Constitution. The Court held that the plaintiffs had a cause of action under the Federal Civil Rights Act because:

> "it alleged that civil rights guaranteed to the plaintiffs by the Fourteenth Amendment are protected by the Civil Rights Acts." (176 F. 2d at 704)

Thus, the action of the Chief of Police in arresting Negroes and whites, for seeking admission to a facility of a privately owned amusement park, upon request by the managers of the amusement park was state action which violated the plaintiffs' rights under the Fourteenth Amendment. Likewise in *Boman v. Birmingham Transit Company*, 280 F. 2d 531 (5th Cir., 1960), the Court held that the enforcement by threat of arrest and criminal action of a company rule requiring Negroes to sit in the rear and white passengers to sit in the front of the company's buses was, along with the fact that the company operated under a special city franchise, sufficient to make the attempted enforcement of the company rule state action and, therefore, enjoinable by a Federal Court. The Court stated that (280 F. 2d at 535):

> ". . . (T)he simple company rule that Negro passengers must sit in back and white passengers must sit in front, while an unnecessary affront to a large group of its patrons, would not effect a denial of constitutional rights *if not enforced by force or by threat of arrest or criminal action.*" (Emphasis supplied.)

Even taking into consideration the relationship between the transit company and the City of Birmingham as a

result of the special franchise granted to the transit company, the particular state action which makes the enforcement of the company rule a violation of the Fourteenth Amendment is the threat or use of arrest and criminal action in case of violation of the rule. The *Boman* case is also particularly relevant to the instant case in that the trial court had already held that the arrest and conviction of the plaintiffs on a charge of disorderly conduct for refusing to move to the rear of the bus was illegal and a deprivation of the plaintiffs' civil rights. The trial court had stated (see the opinion of the Fifth Circuit, *supra*, 280 F. 2d at 533, note 1):

> "Under the undisputed evidence, plaintiffs acted in a peaceful manner at all times and were in peaceful possession of the seats which they had taken on boarding the bus. Such being the case, police officers were without legal right to direct where they should sit because of their color. The seating arrangement was a matter between the Negroes and the Transit Company. It is evident that the arrests at the barn were based on the refusal of the plaintiffs to comply with the request to move since those who would move, though equally involved except as to compliance, were not arrested."

These two cases along with *Shelley v. Kraemer*, *supra*, and *Barrows v. Jackson*, *supra*, make it clear that no matter what the source of the policy to discriminate or segregate on the basis of color, it is state action prohibited by the Fourteenth Amendment to make use of the criminal laws of a state to enforce such a policy; and, therefore, in the instant case, the arrest and conviction of the appellants for refusing to leave the amusement park, because the owner of the park objected to the color of some of the appellants, was a violation of the appellants' rights under the Fourteenth Amendment.

The Maryland Court of Appeals sought to surmount these substantial constitutional difficulties by suggesting that the existence of a disturbance of itself, independently of the owner's discrimination, might have justified the police in arresting the appellants. The Court argued that the fact that a racial discrimination policy was the cause of the disturbance was fortuitous, and not, necessarily, a factor in the arrest. It supposed that the arrest might have been made to further the State's interest in preserving order. Whatever the merits of such an approach under another set of facts might be, it is unsupportable here, in view of the uncontradicted testimony of the police that, on their own, they would not have arrested; that they did so only after asking the owner if it wanted appellants arrested and as a consequence of the owner's insistent reply that appellants should be arrested if they refused to comply with the amusement park's ban on Negroes. The desire to discriminate was, thus, the sole reason for the arrests. There was no separate State interest in the preservation of order.

The Maryland Court of Appeals sought to avoid the constitutional doctrines taught by *Shelley v. Kraemer*, *supra*, and *Barrows v. Jackson*, *supra*, in one other manner. The Court adopted as a major premise the questionable assumption that the operator of an amusement park or other type of business open to the public has an undisputed "right" to exclude from the place of business all members of a particular race. Whether there is, in fact, such a right, in view of the Fourteenth Amendment, is but another way of stating the question which this case presents. Assuming an answer forces a result but represents an abandonment of logical process.

Furthermore, even if the existence of such a "right" in the private owner is assumed, it by no means follows

that there is, *ipso facto*, a further "right" to resort to the state police power to enforce it. If such a right existed in the owner of the amusement park, it did so only by virtue of some precept of Maryland common law, and the Fourteenth Amendment as much interdicts enforcement of common law as making of statute law. The decision in *Shelley v. Kraemer*, *supra*, at p. 13, assumed that, as between the parties, the restrictive covenants were valid; i.e. that the parties had a "right" to enforce them on a voluntary basis. But no subsidiary right to seek state aid in enforcement was deemed to adhere to the right to enforce by voluntary action.

It is not true, in the first place, that the owner of a place of business open to the public has the right to discriminate on the basis of race. When, in the *Civil Rights Cases*, 109 U.S. 3, 3 S. Ct. 18, 27 L. Ed. 835 (1883), the Civil Rights Act of 1875 was held unconstitutional, to the extent that it sought to regulate private action, this Court held only that the refusal to any persons of the accommodations of an inn, public conveyance or place of public amusement by an individual *without any sanction or support from any state law or regulation* did not violate the Fourteenth Amendment, because the Fourteenth Amendment relates only to state action. The *Civil Rights Cases* further decided that the Thirteenth Amendment did not sustain the Act since the private discrimination, even though unlawful, did not amount to slavery or involuntary servitude. The Court said, 109 U.S. at p. 24:

> "Now, conceding, for the sake of the argument, that the admission to an inn, a public conveyance, or a place of public amusement, on equal terms with all other citizens, is the right of every man and all classes of men, is it any more than one of those rights which the states by the Fourteenth Amendment are forbidden to deny to any person? And is the Consti-

tution violated until the denial of the right has some State sanction or authority? Can the act of a mere individual, the owner of the inn, the public conveyance or place of amusement, refusing the accommodation, be justly regarded as imposing any badge of slavery or servitude upon the applicant, or only as inflicting an ordinary civil injury, properly cognizable by the laws of the State, and presumably subject to redress by those laws until the contrary appears?

"After giving to these questions all the consideration which their importance demands, we are forced to the conclusion that such an act of refusal has nothing to do with slavery or involuntary servitude, and that if it is violative of any right of the party, his redress is to be sought under the laws of the State; or if those laws are adverse to his rights and do not protect him, his remedy will be found in the corrective legislation which Congress has adopted, or may adopt, for counteracting the effect of State laws, or State action, prohibited by the Fourteenth Amendment . . ."

This Court, thus, did not hold that the owner of an inn, public conveyance or place of public amusement had a constitutional right to discriminate on the basis of race. On the contrary, this Court assumed that there was a right in all citizens to frequent such places without discrimination on grounds of race or color. See also 109 U.S. at pp. 19, 21, 23, and Justice Harlan's dissent, 109 U.S. at 41-43. This Court merely held that the Federal Government was without power to impose sanctions for violation of the federally created right against the private persons who were the owners of such places of business. Several of the states have remedied the situation in which Federal law creates a right, which is, nevertheless, imperilled by lack of an adequate remedy, through the passage of civil rights acts patterned on the Federal statute. That Mary-

land does not have such a civil rights act means no more than that the federally created right not to be discriminated against in a place of public amusement does not have, in Maryland, adequate enforcement machinery against purely private discrimination.[2] This does not mean, however, that the owner of a place of public amusement has a right to discriminate. A fortiori, it does not mean that he can call on the State of Maryland for aid in discriminating. As was said in *Shelley v. Kraemer*, *supra*, 334 U.S. at 22:

> "It would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment."

For a state to create and enforce a "right" of an owner of a business open to the public to discriminate on the

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[2] Accustomed as we now are to enforcement of federally created rights by direct federal action, we should not lose sight of the fact that such a technique for a federal government marked a great innovation when adopted in 1789. As that acute observer of the American political system, Alexis deTocqueville, pointed out with respect to the Constitution:

> "This Constitution, which may at first sight be confounded with the Federal constitutions which preceded it, rests upon a novel theory, which may be considered as a great invention in modern political science. In all the confederations which had been formed before the American Constitution of 1789 the allied States agreed to obey the injunctions of a Federal Government; but they reserved to themselves the right of ordaining and enforcing the execution of the laws of the Union. The American States which combined in 1789 agreed that the Federal Government should not only dictate the laws but that it should execute its own enactments. In both cases the right is the same, but the exercise of the right is different; and this alteration produced the most momentous consequences." deTocqueville, *Democracy in America* (Oxford University Press, 1947), pages 88-89.

Adoption of the Fourteenth Amendment represented a return, in one limited instance, to the earlier general practice of committing enforcement of a federally created right to the several states. That a state might fail in its obligation to enforce such a right does not create a "right" in those who thereupon flaunt the federal right.

basis of race would be state action within the meaning of the Fourteenth Amendment, and, therefore, subject to the restrictions of that amendment. And even though it be assumed that the owner of purely private property has a constitutional right to the enjoyment of his property without interference from others, it must be remembered that the property here involved has been thrown open to public use. The statute under which appellants were convicted required an express determination that the amusement park was a *place of public resort or amusement*. The effect of the conduct by the owner of a business open to the public must be considered. This Court in *Marsh v. Alabama*, 326 U.S. 501, 506, 66 S. Ct. 276, 90 L. Ed. 265 (1946), pointed out that:

> "Ownership does not always mean absolute dominion. The more the owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it . . ."

It is apparent, therefore, that the basic premises of the Maryland Court of Appeals in the instant case concerning the supposed rights of the owner of a business to discriminate on the basis of race — and to seek state assistance in such discrimination — have never been supported by this Court, and present serious constitutional questions.

2. The arrest and conviction of the appellants is the denial of the rights of the appellants to freedom of speech and freedom of assembly.

The attendance of the white and Negro appellants together at a celebration named "All Nations Day" was more than merely an attempt to enjoy a public amusement park. Their very association together symbolized the idea expressed by an "All Nations Day" celebration.

They were, therefore, exercising their rights of freedom of speech and freedom of association, and the arrest and conviction of the appellants for disorderly conduct for exercising these rights is in contravention of the Fourteenth Amendment. If the appellants were, when arrested, carrying signs proclaiming the idea expressed by their association together, they would clearly be protected from arrest and conviction by the interpretation given the Fourteenth Amendment in *Marsh v. Alabama, supra*, and in *Terminiello v. Chicago*, 337 U.S. 1, 69 S. Ct. 894, 93 L. Ed. 1131 (1949). Yet no placard could have expressed with greater eloquence the point of view which appellants displayed by appearing together in public despite their difference in color. The effect of the *Marsh* decision is that, where a private property owner invites the general public onto his property for his own benefit, the owner relinquishes his right to exclude members of the public at will where their activities are peaceful and in furtherance of the rights of freedom of speech and assembly. In the instant case, the owner of the amusement park, by admitting members of the public at large (except for Negroes) relinquished his right to exclude the appellants while they, by their very act of associating together, exercised the right of free speech to advocate the breaking down of artificial barriers based upon race.

3. The arrest and conviction of the appellants without any evidence that the appellants acted in a disorderly manner to the disturbance of the public peace is a denial of the rights of the appellants to due process of law under the Fourteenth Amendment.

This Court in *Thompson v. Louisville*, 362 U.S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654 (1960), held that a conviction without any evidence of guilt amounts to a denial of due process under the Fourteenth Amendment. In the

instant case, unless the polite refusal to leave a public amusement park, when the request to leave results from the policy of the owner not to admit Negroes, is, without more, in and of itself disorderly conduct, there is no evidence to support the arrest and conviction of the appellants. The District Court in *Boman v. Birmingham Transit Co.*, *supra*, held, and the Fifth Circuit Court of Appeals agreed, that the mere refusal to obey an order designed to enforce a discriminatory practice was not disorderly conduct. To hold that such conduct could be a violation of a disorderly conduct statute would be just another way of permitting state action to enforce private discrimination. Cf. *Niemotko v. Maryland*, *supra*, which upset a conviction under the same criminal statute here involved. There the defendants' actions were taken in the face of police orders and threats of arrest if the orders were disobeyed. See *Niemotko v. State*, 194 Md. 247, 250, 71 A. 2d 9, 10 (1950).

4. The arrest and conviction of the appellants for disorderly conduct in face of the failure of the State to arrest and convict members of the crowd who were actually engaged in disorderly conduct is a denial to the appellants of equal protection of the laws.

The evidence clearly shows that the members of the crowd which surrounded the appellants and the police actually engaged in the only disorderly conduct which took place. The crowd spat, kicked and used improper language. The appellants were polite and mannerly at all times. Neither the park owner nor the police made any attempt to quell the disorder or to arrest any of the members of the crowd engaged in such conduct. The arrest and conviction of the appellants under such cir-

cumstances denied appellants equal protection of the law. *Pace v. Alabama*, 106 U.S. 583, 1 S. Ct. 637, 27 L. Ed. 207 (1882).

CONCLUSION

It is submitted that the decision of the Court of Appeals of Maryland fails to recognize the limitations imposed by the Fourteenth Amendment upon the State's power to enforce discrimination in places of public resort or amusement through the use of its criminal laws; fails to recognize the limitations imposed by the equal protection and due process clauses of the Fourteenth Amendment upon the State's power to punish, through the use of its criminal laws, exercises of the right to freedom of speech and freedom of assembly upon private property open to the general public; fails to recognize the limitations of the due process clause of the Fourteenth Amendment upon the power of a State to convict a person for a violation of a criminal statute without any evidence of the substantial elements of the crime; fails to recognize the limitations imposed by the equal protection clause of the Fourteenth Amendment upon the State's power to discriminate among those who are violating the criminal statute between those who are to be prosecuted and those who are not to be prosecuted. We believe that the foregoing questions are substantial because:

> "The problem of defining the scope of the restrictions which the Federal Constitution imposes upon exertions of power by the States has given rise to many of the most persistent and fundamental issues which this Court has been called upon to consider." (*Shelley v. Kraemer*, *supra*, at 22).

The problems raised by this case are being encountered in numerous other states and similar cases are presented in petitions recently filed in this Court for writs of

certiorari to the Supreme Court of Louisiana, *Garner v. Louisiana*, No. 617, *Briscoe v. Louisiana*, No. 618, *Hoston v. Louisiana*, No. 619, and to the Circuit Court for Leon County, Florida, *Steele v. Tallahassee*, No. 671 (all October Term, 1960). Similar issues are presented again to the Court of Appeals of Maryland in *Griffin v. State*, No. 248 (September Term, 1960).

Respectfully submitted,

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APPENDIX A

Opinion of Court of Appeals of Maryland

Hammond, J.:

The four appellants were convicted by the court sitting without a jury of violating Code (1957), Art. 27, Sec. 123, by "acting in a disorderly manner to the disturbance of the public peace" in a "place of public resort or amusement." Two of appellants are white men, one is a white woman, and the other a Negress. Accompanied by a Negro who was not tried, they had gone as a group to Gwynn Oak Amusement Park in Baltimore County, which as a business policy does not admit Negroes, and were arrested when they refused to leave after being asked to do so.

Appellants claim that there was no evidence that the Park is a place of public resort or amusement, that if there were such evidence the systematic exclusion of Negroes prevents the Park from being regarded as such a public place, that they were not guilty of disorderly conduct and, finally, if the Park is a place of public resort or amusement their presence there was in the exercise of a constitutional right, and their arrest and prosecution amounted to State action to enforce segregation in violation of the Constitution of the United States.

There is no direct statement in the record that the Park is a place of public resort or amusement but we think the evidence clearly permitted the finding the trial court made that it is. There was testimony which showed, or permitted the inference, that the Park is owned by a private corporation, that it has been in operation each summer for many years, that among its attractions are a miniature golf course and a cafeteria, that appellants' conduct occurred on "All Nations Day" which usually attracts a large crowd, that on that day the Park was so crowded there was but elbow room to walk, and that the Park's policy was to welcome everyone but Negroes. The trial court properly could have concluded the Park is a place resorted to by the general public for amusement. Cf. *Iozzi v. State*, 224 Md. 42.

A lawmaking body is presumed by the Courts to have used words in a statute to convey the meaning ordinarily attributed to them. In recognition of this plain precept the Courts, in construing zoning, licensing, tax and anti-discrimination statutes, have held that the term place of public resort or amusement included dance halls, swimming pools, bowling alleys, miniature golf courses, roller skating rinks and a dancing pavilion in an amusement park (because it was an integral part of the amusement park), saying that amusement may be derived from participation as well as observation. *Amos v. Prom, Inc.*, 117 F. Supp. 615; *Askew v. Parker* (Cal. App.), 312 P. 2d 342; *Jaffarian v. Building Com'r.* (Mass.), 175 N.E. 641; *Jones v. Broadway Roller Rink Co.* (Wis.), 118 N.W. 170, 171; *Johnson v. Auburn & Syracuse Electric R. Co.* (N.Y.), 119 N.E. 72. Section 123 of Art. 27 proscribes conduct which disturbs the public peace at a place where a number of people are likely to congregate, whether it is on governmental property or on property privately owned. This is made clear by the prohibition of offensive conduct not only on any public street or highway but in any store during business hours, and in any elevator, lobby or corridor of an office building or apartment house having more than three dwelling units, as well as in any place of public worship or any place of public resort or amusement. We read the statute as including an amusement park in the category of a place of public resort or amusement.

We find no substance in the somewhat bootstrap argument that the regular exclusion of Negroes from the Park kept it from being within the ambit of the statute. Early in the common law the duty to serve the public without discrimination apparently was imposed on many callings. Later this duty was confined to exceptional callings, as to which an urgent public need called for its continuance, such as innkeepers and common carriers. Operators of most enterprises, including places of amusement, did not and do not have any such common law obligation, and in the absence of a statute forbidding discrimination, can pick and choose their patrons for any reason they decide

upon, including the color of their skin. Early and recent authorities on the point are collected, and exhaustively discussed, in the opinion of the Supreme Court of New Jersey in *Garifine v. Monmouth Park Jockey Club*, 148 A. 2d 1. See also *Greenfeld v. Maryland Jockey Club*, 190 Md. 96; *Good Citizens Community Protective Assoc. v. Board of Liquor License Commissioners*, 217 Md. 129, 131; *Slack v. Atlantic White Tower System, Inc.*, 181 F. Supp. 124; *Williams v. Howard Johnson's Restaurant*, 268 F. 2d 845.

It has been noted in the cases that places of public accommodation, resort or amusement properly can exclude would-be patrons on the grounds of improper dress or uncleanliness, *Amos v. Prom, Inc., supra* (at page 629 of 117 F. Supp.); because they are under a certain age, are men or are women, or are unescorted women, *Collister v. Hayman* (N.Y.), 76 N.E. 20; or because for some other reason they are undesirables in the eyes of the establishment. *Greenfeld v. Maryland Jockey Club; Good Citizens Protective Assoc. v. Board of Liquor License Commissioners; Slack v. Atlantic White Tower System, Inc.*, all *supra*. See 86 C.J.S. *Theaters and Shows* Secs 31 and 34 to 36. We have found no decision holding that a policy of excluding certain limited kinds or classes of people prevents an enterprise from being a public resort or amusement, and can see no sound reason why it should.

Appellants' argument that they were not disorderly is that neither the mere infringement of the rules of a private establishment nor a simple polite trespass constitutes either a breach of the peace or disorderly conduct. We find here more than either of these, enough to have permitted the trier of fact to have determined as he did that the conduct of appellants was disorderly.

It is said that there was no common law crime of disorderly conduct. Nevertheless, it was a crime at common law to do many of the things that constitute disorderly conduct under present day statutes, such as making loud noises so as to disturb the peace of the neighborhood, collecting a crowd in a public place by means of loud or unseemly noises or language, or disturbing a meeting as-

sembled for religious worship or any other lawful purpose. *Hochheimer on Crimes and Criminal Procedure*, Sec. 392 (2nd Ed.); *1 Bishop on Criminal Law*, Sec. 542 (9th Ed.); *Campbell v. The Commonwealth*, 59 Pa. St. Rep. 266.

The gist of the crime of disorderly conduct under Sec. 128 of Art. 27, as it was in the cases of common law predecessor crimes, is the doing or saying, or both, of that which offends, disturbs, incites, or tends to incite, a number of people gathered in the same area. 3 Underhill, *Criminal Evidence*, Sec. 850 (5th Ed.), adopts as one definition of the crime the statement that it is conduct "of such a nature as to affect the peace and quiet of persons who may witness the same and who may be disturbed or provoked to resentment thereby." Also, it has been held that failure to obey a policeman's command to move on when not to do so many endanger the public peace, amounts to disorderly conduct. *Bennett v. City of Dalton* (Ga. App.), 25 S.E. 2d 726, appeal dismissed, 320 U.S. 712, 88 L. Ed. 418. In *People v. Galpern* (N.Y.), 181 N.E. 572, 574, it was said, under a New York statute making it unlawful to congregate with others on a public street and refuse to move on when ordered by the police, that refusal to obey an order of a police officer, not exceeding his authority, to move on "even though conscientious — may interfere with the public order and lead to a breach of the peace," and that such a refusal "can be justified only where the circumstances show conclusively that the police officer's direction was purely arbitrary and was not calculated in any way to promote the public order." See also *In re Neal*, 164 N.Y.S. 2d 549 (where the refusal of a school girl to leave a school bus when ordered to do so by the authorities was held to be disorderly conduct, largely because of its effect on the other children); Underhill, in the passage cited above, concludes that "failure to obey a lawful order of the police, however, such as an order to move on, may amount to disorderly conduct." See also *People v. Nixson* (N.Y.), 161 N.E. 463; 27 C.J.S. *Disorderly Conduct*, Sec. 1(4) f; annotation 65 A.L.R. 2d 1152; compare *People v*

Carcel (N.Y.), 144 N.E. 2d 81; and *People v. Arko*, 199 N.Y.S. 402.

Appellants refused to leave the Park although requested to do so many times. A large crowd gathered around them and the Park employee who was making the requests, and seemed to "mill in and close in" so that the employee sent for the Baltimore County police. The police, at the express direction of the manager of the Park, asked the appellants to leave and again they refused, even when told they would be arrested if they did not. Admittedly they were then deliberately trespassing. That they intended to continue to trespass until they were forcibly ejected is made evident by their conduct when told they were under arrest. The five joined arms as a symbol of united defiance and then two of the men dropped to the ground. Two of the appellants had to be carried from the Park, the other three had to be pushed and shoved through the crowd. The effect of the appellants' behavior on the crowd is shown by the testimony that its members spit and kicked and shouted threats and imprecations, and that the Park employees feared a mob scene was about to erupt. The conduct of appellants in refusing to obey a lawful request to leave private property disturbed the public peace and incited a crowd. This was enough to sustain the verdict reached by Judge Menchine.

We turn to appellants' argument that the arrest by the County police constituted State action to enforce a policy of segregation in violation of the ban of the Equal Protection and Due Process clauses of the Fourteenth Amendment against State-imposed racial discrimination. The Supreme Court said in the racial covenant case of *Shelley v. Kraemer*, 334 U.S. 1, 13, 92 L. Ed. 1161, 1180: "The action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful". The Park had a legal right to maintain a business policy of excluding Negroes. This was a private policy which the State neither required nor

assisted by legislation or administrative practice. The arrest of appellants was not because the State desired or intended to maintain the Park as a segregated place of amusement; it was because the appellants were inciting the crowd by refusing to obey valid commands to move from a place where they had no lawful right to be. Both white and colored people acted in a disorderly manner and the State, without discrimination, arrested and prosecuted all who were so acting

While there can be little doubt that the Park could have used its own employees to eject appellants after they refused to leave, if it had attempted to do so there would have been real danger the crowd would explode into riotous action. As Judge Thomsen said in *Griffin v. Collins*, 187 F. Supp. 149, 153, in denying a preliminary injunction and a summary judgment in a suit brought to end the segregation policy of the Glen Echo Amusement Park near Washington: "Plaintiffs have cited no authority holding that in the ordinary case, where the proprietor of a store, restaurant, or amusement park, himself or through his own employees, notifies the Negro of the policy and orders him to leave the premises, the calling in of a peace officer to enforce the proprietor's admitted right would amount to deprivation by the state of any rights, privileges or immunities secured to the Negro by the Constitution or laws. Granted the right of the proprietor to choose his customers and to eject trespassers, it can hardly be the law, as plaintiffs contend, that the proprietor may use such force as he and his employees possess but may not call on a peace officer to enforce his rights."

The Supreme Court has not spoken on the point since Judge Thomsen's opinion. The issue was squarely presented for decision in *Boynton v. Virginia*, 364 U.S. 454, 5 L. Ed. 2d 206, but the Court chose to decide the case on the basis that the conviction of a Negro for unlawfully remaining in a segregated bus terminal restaurant violated the Interstate Commerce Act, which uses broad language to forbid a carrier from discriminating against a passenger. In the absence of controlling authority to

the contrary, it is our opinion that the arresting and convicting of appellants on warrants sworn out by the Park for disorderly conduct, which resulted from the Park enforcing its private, lawful policy of segregation, did not constitute "such action as may fairly be said to be that of the States." It was at least one step removed from State enforcement of a policy of segregation and violated no constitutional right of appellants.

JUDGMENTS AFFIRMED, WITH COSTS.

APPENDIX B

MEMORANDUM OPINION OF CIRCUIT COURT FOR BALTIMORE COUNTY

(Filed May 6, 1960)

The facts of the case are not in serious dispute. On Sunday, September 6, 1959, at the Gwynn Oak Amusement Park, located in Baltimore County, "All Nations Day" was being celebrated. It was a "right crowdy day * * *. There was just more or less elbow room when you walked anywhere in the park." (Tr. 48) The Park is privately owned by a corporation, known as Gwynn Oak, Incorporated. There is no evidence that there was any sign or signs to indicate that any particular segment of the population would not be welcome, so that for the purpose of this case it is assumed by the Court that there were no such signs.

At about 3 o'clock in the afternoon, a special officer employed by Gwynn Oak Park, Incorporated observed five persons in approximately the center of the Park, near the cafeteria and miniature golf course. This employee approached the group, consisting of three white and two colored persons, and advised them that the Park was closed to colored people, and that the colored people would have to leave (Tr. 19). It was explained that the management of the Park had a policy opposing the use of the Park by colored persons. The request that the colored persons leave was repeated four or five times (Tr. 21). All five persons

were very polite (Tr. 22), but, in response to the request that they leave, one of the members of the group stated that he was enjoying himself, and that he thought he would stay and look around. The first request to leave was directed to the two colored people, but when they refused to leave the whole group of five persons was asked to go, but all refused (Tr. 22).

There was no crowd surrounding the group at the time of the initial observation by the special officer, but the crowd began to congregate after the five persons were asked to leave the Park by the special officer (Tr. 37). The special officer sought the assistance of the Baltimore County Police, who were stationed at the entrance to the Park, after first confirming with the management of the latter's desire to forbid the continued presence of colored persons upon the property. Upon such confirmation, the Baltimore County Police were summoned to the area where the five persons were and by the time of the arrival of the Baltimore County Police a crowd had gathered (Tr. 47). The Baltimore County Police requested the group of five persons to leave the Park two or three times before the arrest (Tr. 35). The period of time between the time of the initial request to leave and the time of actual arrest covered a period of about ten or fifteen minutes (Tr. 36).

Prior to the actual arrest, a good sized crowd gathered around and seemed to mill in and close in on the group and the police. The crowd was milling around and seemed very angry (Tr. 23), and seemed at the point where it would get out of control and became a mob scene (Tr. 26 and 27).

In spite of the requests by the employee of the management and the two or three requests by Baltimore County Police that the group leave the Park, the five persons steadfastly refused to move. They were thereupon placed under arrest and at that time joined their arms together. Two men in the group dropped to the ground in a prone or semi-prone position. All were escorted from the premises by the police with a degree of resistance. The resistance took the form in two instances of requiring the police physically

to carry them; the resistance as to the other three took the form of merely holding back as they were being walked out of the Park.

On these facts the State has elected to bring this prosecution by way of criminal information on the statutory charge of disturbing the peace under Article 27, Section 123.

The reasonable inference exists that the group was not aware that the management had adopted a policy of barring persons because of color at the time of their entry upon the property. The evidence is clear, however, that this management policy became known to the accused through statements to them by an employee of the corporation, and by the Baltimore County Police, before the arrest was made.

The first question which arises in the case is the question whether an owner of private property to which substantial numbers of persons are invited has any right to discriminate with respect to persons invited thereon, that is to say, whether such owner may exercise his own arbitrary freedom of selection in determining who will be admitted to and who will be permitted to remain upon his property under circumstances where such private property is being used as a place of resort or amusement. This question has been clearly answered in the affirmative by the authorities. In *Madden v. Queens County Jockey Club*, 72 N.E. 2d 697 (Court of Appeals of New York), it was said at Page 698:

> "At common law a person engaged in a public calling, such as innkeeper or common carrier, was held to be under a duty to the general public and was obliged to serve, without discrimination, all who sought service. * * * On the other hand, proprietors of private enterprises, such as places of amusement and resort, were under no such obligation, enjoying an absolute power to serve when they please. * * *
>
> "The common-law power of exclusion, noted above, continues until changed by legislative enactment."

The ruling therein announced was precisely adopted in the case of *Greenfeld v. Maryland Jockey Club*, 190 Md. 96, the Court of Appeals, stating at Page 102 of its opinion that:

> "The rule that, except in cases of common carriers, innkeepers and similar public callings, one may choose his customers is not archaic."

The Court of Appeals also carefully pointed out in the *Greenfeld* case that the rule of the common law is not altered even in the case of a corporation licensed by the State of Maryland. The doctrine of the *Madden* and *Greenfeld* cases, *supra*, announced as existing under the common law, has been held valid, even where the discrimination was because of race or color. See *Williams v. Howard Johnson Restaurant*, 268 F. 2d 845 (restaurant) (CCA 4th); *Slack v. Atlantic White Tower Systems, Inc.*, No. 11073 U.S.D.C. for the District of Maryland, Thomsen, J. (restaurant); *Hackley v. Art Builders, Inc., et al* (U.S.D.C. for the District of Maryland, D.R. January 16, 1960 (real estate development)).

The right of an owner of property arbitrarily to restrict its use to invitees of his selection is the established law of Maryland. Changes in the rule of law conferring that right are for the legislative and not the judicial branch of government.

The question next arises as to whether or not the State has proved its case under the criminal information on which it elected to proceed. It is a fundamental of our law that the burden rests upon the State to establish guilt beyond a reasonable doubt and to a moral certainty, and this requirement extends to every element of the crime charged. Basically, therefore, consideration must be given to a determination of two questions: (1) Has the State proved beyond a reasonable doubt that the Defendants were acting in a disorderly manner to the disturbance of the public peace? (3) If the answer to the first question is in the affirmative, has the State proved beyond a reason-

able doubt that such actions occurred at a place of public resort or amusement?

As to the first question—an able discussion of whether a refusal to comply with directions given by a police officer could be held to be disorderly conduct appears in the case of *People v. Arko*, 199 N.Y.S. 402, in which it was said at page 405:

> "At times even a mere refusal to comply with the directions of a policeman, who may act in an arbitrary and unjustifiable way, does not constitute 'disorderly conduct'. Mere disobedience of an officer is not always an offense punishable by law, any more than his command is not always the law. There must be, upon the whole case, something more than a mere whimsical or capricious judgment on the part of the public authorities. * * * The case must present proof of some definite and unmistakable misbehavior, which might stir if allowed to go unchecked, the public to anger or invite dispute, or bring about a condition of unrest and create a disturbance."

In the case of *People v. Nixon*, 161 N.E. 463 (N.Y.), it was said at page 466:

> "Police officers are guardians of the public order. Their duty is not merely to arrest offenders, but to protect persons from threatened wrong and to prevent disorder. In the performance of their duties they may give reasonable directions."

In the case of *People v. Galpern*, 181 N.E. 572 (N.Y.), it was said at Page 572:

> "Failure, even though conscientious, to obey directions of a police officer, not exceeding his authority, may interfere with the public order and lead to a breach of the peace."

And, at Page 574, went on to say:

> "A refusal to obey (a police order to leave) can be justified only where the circumstances show con-

clusively that the police officer's direction was purely arbitrary and not calculated in any way to promote the public order."

The facts and circumstances hereinbefore stated offer clear and convincing proof that public disorder reasonably could be expected to follow if the five persons remained in the Park. The order of the police to leave, therefore, was not arbitrary. The refusal of the Defendants to leave upon request of the police, under the circumstances described in the evidence, constituted acting in a disorderly manner to the disturbance of the public peace.

We pass then to the second question: Did such action occur at a place of public resort or amusement? This involves a determination of the legislative meaning of the expression "place of public resort or amusement". If the legislative intent was that the words were intended to apply only to publicly owned places of resort or amusement, then, manifestly, the testimony would not support a conviction here. By the same token, if the expression was intended to apply only to places in which all members of the public without exception were authorized or permitted to congregate, again there would be no evidence to support conviction here. On the other hand, if the reasonable intent and purpose of the quoted phrase was to prohibit disorderly conduct in a place where some segment of the public habitually gathers and congregates, the evidence would clearly justify a conviction.

The first suggested interpretation of the words must be rejected, because of the fact that the same statute uses the term "public worship", and this fact utterly destroys a contention that the word "public" has a connotation of public ownership because of our constitutional separation of church and state.

The second suggested interpretation is equally invalid, because its effect, in the light of the rule of law announced in the *Greenfeld* case, *supra*, would be the precise equivalent of the first suggested interpretation of the phrase.

Moreover, such an interpretation necessarily would mean that the police authorities would be powerless to prevent disorder or bring an end to conditions of unrest and potential disturbance where large numbers of the public may be in congregation. To suggest such an interpretation is to refute it.

In the opinion of this Court the statute has clear application to any privately owned place, where crowds of persons other than the owner of the premises habitually gather and congregate, and where, in the interest of public safety, police authorities lawfully may exercise their function of preventing disorder. See *Askew v. Parker*, 312 P. 2d 342 (California). See also *State v. Lanouette*, 216 N.W. 870 (South Dakota).

It is the conclusion of the Court that the Defendants are guilty of the misdemeanor charged.

W. ALBERT MENCHINE,

Judge.

Towson, Maryland

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960 63

No. ~~840~~ 3

DALE H. DREWS, ET AL., *Appellants,*

v.

STATE OF MARYLAND, *Appellee.*

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. ------

DALE H. DREWS, ET AL.,
Appellants,

v.

STATE OF MARYLAND,
Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF MARYLAND

MOTION TO DISMISS OR AFFIRM

The Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves to dismiss or affirm on the following grounds:

(a) This appeal is not within the jurisdiction of this Court because it has not been taken in conformity with statute.

(b) This appeal does not present any substantial Federal question as to warrant further argument.

STATEMENT OF FACTS

The four Appellants were convicted by the Circuit Court of Baltimore County, Maryland, sitting without a jury, of

violating Article 27, Section 123, of the Annotated Code of Maryland (1957 Ed.), "by acting in a disorderly manner to the disturbance of the public peace" in a "place of public resort or amusement". Two of the Appellants are white men, one is a white woman and the last a Negress.

The Appellants, accompanied by a Negro who was not tried, on Sunday, September 6, 1959, went to Gwynn Oak Park, a public amusement park in Baltimore County, owned and operated by a private corporation. The management of the park as a business policy did not admit Negroes and the Appellants were requested by a private park guard to leave the premises. The Appellants refused and, as a result, a crowd began to gather. The private police officer enlisted the assistance of Baltimore County policemen who were stationed on a public road nearby to eject the group from the park. Baltimore County policemen arrived and requested that the Appellants leave the park. Upon receiving instructions from the park management, the Baltimore County policemen advised the Appellants that they had a choice of withdrawing or being arrested. They refused to leave, at which time they interlocked their arms and two of them dropped on the ground in a prone position. As a result of this conduct, the crowd which had gathered became unruly and began hollering, spitting and kicking at the Appellants as well as the officers, creating a mob scene. The Appellants were thereupon taken by the County Police from the scene and transported to a nearby police station where a warrant was sworn out by the amusement park management.

Thereafter, the State filed a criminal information charging violation of Article 27, Section 123, of the Annotated Code of Maryland, *supra*, and the Appellants elected to be tried by the Court sitting without a jury. The trial court, by its opinion dated May 6, 1960 (Appendix B of the Juris-

dictional Statement), found that from the facts and circumstances there was clear and convincing proof that public disorder reasonably could be expected if Appellants were allowed to remain in the park, and that the continued refusal of the Appellants to leave at the request of the police constituted "acting in a disorderly manner to the disturbance of the public peace." From the opinion of the trial court, it does not appear that the Appellants raised any Constitutional issues in that court. In fact, the Motion for Directed Verdict made by counsel for the Appellants in the trial court only raised two grounds: (1) "... that there had been no proof to indicate that the nature of the area in which the alleged offenses occurred was a place of public resort or amusement" and (2) "... that there has been no indication of any action on the part of the Defendants which would be described as disorderly".

On appeal to the Court of Appeals of Maryland, the Appellants raised four questions, to wit:

1. What constitutes a place of public resort or amusement within the meaning of Article 27, Section 123 of the Annotated Code?

2. Was there evidence to establish the public character of Gwynn Oak Park, the scene of the actions with which Appellants were charged?

3. Did any acts of Appellants constitute acting in a disorderly manner to the disturbance of the public peace?

4. Did conviction of Appellants infringe upon the rights privileges and immunities guaranteed to them by the Fourteenth Amendment to the Constitution of the United States?

The Court of Appeals of Maryland, notwithstanding the fact that the Appellants did not raise constitutional questions in the lower court, found by its opinion that the

amusement park had a legal right to maintain a business policy of excluding Negroes, a private policy in which the State neither legislated or assisted. The Court further found that the arrest of the Appellants was not because the State desired or intended to maintain the park as a segregated place of amusement, but, rather, because the Appellants were inciting a crowd by refusing to obey a valid directive to move from a place where they had no lawful right to be. The Court of Appeals of Maryland concluded that the action of the State in arresting and convicting the Appellants on warrants sworn out by the amusement park for disorderly conduct did not constitute "such action as may fairly be said to be that of the State's."

ARGUMENT

I.

THIS CASE IS NOT WITHIN THE APPELLATE JURISDICTION OF THIS COURT.

The Appellants did not claim at any stage of the proceedings that the provisions of Article 27, Section 123, Annotated Code of Maryland, *supra*, were void, but, rather, now contend that the application of the statute was discriminatory and, therefore, in violation of the Fourteenth Amendment. Since no claim is made that the statute involved was invalid, an appeal will not lie. See *Charleston Federal Savings & Loan Association v. Alderson*, 324 U.S. 182, 185; *Jett Bros. Distilling Co. v. Carrollton*, 252 U.S. 1; *Mergenthaler Linotype v. Davis*, 251 U.S. 256, 259.

II.

THIS APPEAL DOES NOT PRESENT ANY SUBSTANTIAL FEDERAL QUESTION AND IT IS MANIFEST THAT THE QUESTIONS ON WHICH THE DECISION OF THIS CASE DEPENDS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

The Appellants assert that the State of Maryland, as a result of the decision below, has made the act of refusing

to leave an amusement park owned by a private corporation, when the request to leave arises solely from the policy of the park to exclude Negroes, a criminal offense. Nothing can be further from correct. The position of the State of Maryland in this case is very clear. The State of Maryland neither required nor assisted by legislation or otherwise the decision of the amusement park, as a matter of business policy, to exclude Negroes. The State of Maryland has neither condemned nor condoned such business decision and policy. The arrest of the Appellants was not because the State desired or intended to maintain the park as a segregated place of amusement, but rather because the Appellants were inciting the crowd and, therefore, were acting in a disorderly manner. Both white and colored people in this instance acted in a disorderly manner, and the State without discrimination arrested and prosecuted all those who were so acting. As was stated by this Court in *Shelley v. Kraemer*, 334 U.S. 1, 13:

> "The action inhibited by the first Section of the Fourteenth Amendment is only such action as may be fairly said to be that of the State's. *That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.*" (Emphasis supplied.)

The State of Maryland has not only the right but the duty to protect the public against disorders which may occur, regardless of the race of the participants. It was clearly recognized in the case of *Bernstein v. Real Estate Commission of Maryland*, 221 Md. 221, appeal dismissed 363 U.S. 419, that the general State laws apply to all with equal force, regardless of their race, and that violation of the general public laws cannot be shielded from State action on account of race. To follow the Appellants' contention,

if an argument arose between two private persons engendered by racial discrimination, and one of the persons caused physical harm or death to the other, the State would be powerless to prosecute the offender because the private argument erupted from a racial question. Thus, if one of the individuals was murdered, the State would be powerless to prosecute the murderer because it would, under the Appellants' theory, be fostering a policy of racial discrimination. With this contention, the State of Maryland most emphatically demurs. The Appellants are not entitled to an unexpressed exemption in the disorderly conduct law.

In the recent case of *Griffin v. Collins*, 187 F. Supp. 149, 153, Chief Judge Thomsen of the United States District Court for the District of Maryland, in denying a preliminary injunction and motion for summary judgment in a suit brought to end the segregation policy of the Glen Echo Amusement Park near Washington, stated:

> "Plaintiffs have cited no authority holding that in the ordinary case, where the proprietor of a store, restaurant, or amusement park, himself or through his own employees, notifies the Negro of the policy and orders him to leave the premises, the calling in of a peace officer to enforce the proprietor's admitted right would amount to deprivation by the state of any rights, privileges or immunities secured to the Negro by the Constitution or laws. *Granted the right of the proprietor to choose his customers and to eject trespassers, it can hardly be the law, as plaintiffs contend, that the proprietor may use such force as he and his employees possess but may not call on a peace officer to enforce his rights.*" (Emphasis supplied.)

To permit the contention of the Appellants herein to be established as the law of this nation would completely

obliterate the rights of owners of private property to keep unwanted persons from such property. It has been clearly established and recognized that places of public accommodation, resort and amusement can exclude patrons which they deem undesirable in the eyes of the management. See *Garifine v. Monmouth Park Jockey Club*, 148 A. 2d 1 (New Jersey); *Madden v. Queen's County Jockey Club*, 72 N.E. 2d 697 (New York); *Greenfeld v. Md. Jockey Club*, 190 Md. 96, 57 A. 2d 335; *Slack v. Atlantic White Tower Systems, Inc.*, 181 F. Supp. 124; *Williams v. Howard Johnson's Restaurant*, 268 Fed. 2d 845.

This Court, in the recent case of *Boynton v. Virginia*, 364 U.S. 354, clearly recognized this principle when it said that every time a bus stops at a wholly independent roadside restaurant, the Interstate Commerce Act does not require that restaurant service be supplied in harmony with the provisions of that Act. The issues presented in the case at bar were squarely presented for decision in the *Boynton* case, *supra*, but the Court chose to decide the case on other grounds.

The establishment involved in this case was not publicly owned or operated, nor was it operated by or franchised by the State, and the State had no law requiring segregation on these premises. Consequently, under the general principles of law enunciated by this Court, as well as the rulings of the lower Federal Courts cited herein, the police officers did have a legal right to direct the Appellants to leave the park after their refusal to obey the order of the private police officer. Since the Appellants disobeyed the officer's directive and in so doing created a public disturbance, the State of Maryland had every right to arrest and prosecute the Appellants for this disturbance.

CONCLUSION

In conclusion, the State of Maryland respectfully submits that the appeal from the Court of Appeals of Maryland be dismissed, or, in the alternative, the decision of the Court of Appeals be affirmed, the mandate to issue forthwith.

Respectfully submitted,

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For Appellee.